

PHANG QUEE v. VIRUTTHASALAM & ORS.

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and Tan Ah Tah F.J.) May 13, 1965]

[K.L. — Federal Court Civil Appeal No. 104 of 1964]

Contract — Sub-lease of mining land — Agreement for a period of three years — Surrender of sub-lease with consent of appellant — Contract rescinded by mutual consent — Claim for money paid by way of advance payment for tribute — No total failure of consideration.

The appellant had subleased mining land to the respondents for a period of three years. The respondents agreed to advance money to be treated as advance payment of tribute and it was agreed that this sum was to be repaid by deduction of the tribute payable under the lease. The respondents subsequently surrendered the sublease and thereupon claimed the balance of the money advanced by them, less the tributes payable and judgment was given in their favour ([1965] 1 M.L.J. 133). The appellants appealed.

Held: as there was a rescission of the contract by mutual consent and as there was no total failure of consideration the respondents could not claim for recovery of the money advanced by them under the contract.

Cases referred to:—

- (1) *Davies v. Street* 171 E.R. 1084.
- (2) *Colton v. Dorrell* 17 W.R. 672.
- (3) *Hunt v. Silk* 102 E.R. 1142.
- (4) *Mayson v. Clouet* [1924] A.C. 980.
- (5) *Lee Sau Keng v. Yong Hong Fa* [1953] M.L.J. 107 at p. 114.
- (6) *Dies and another v. British and International Mining and Finance Co. Ltd.* [1939] 1 K.B. 724.

FEDERAL COURT.

Yong Joon Hong for the appellant.

Chin Yoon Chong for the respondent.

Thomson L.P.: I have had the advantage of reading the judgment of Dato' Syed Sheh Barakbah with which I am in entire agreement.

I do not think we are really concerned with the construction of the agreement between the parties as embodied in the sub-lease of 3rd January, 1961.

The matter is to be decided on the pleadings (for there is no other material) and on the pleadings it is clear that the plaintiffs surrendered the sub-lease and that the defendant accepted the surrender.

At the time of the surrender the contract between the parties was still executory on both sides since the term of the lease had not expired. In the circumstances the surrender of the lease puts an end to it by an agreement which in itself was binding on each of the parties, the consideration passing to each of the parties being found in the abandonment by the other of his right to performance. In the circumstances the original contract embodied in the lease was at an end and, no breach having been alleged by either side, neither could then be under any contractual obligation to the other. Had there been

A complete failure of consideration, that is to say in simple terms had the plaintiffs, the lessees, had nothing for their money no doubt they would have had an action for what they had paid whether by way of premium or advance of tribute as for money had and received. There had, however, been no such complete failure of consideration. They had had something for the money and in the circumstances for the reasons set out by my Lord they can recover nothing.

B Had the parties seen fit to do so they could have come to some agreement as to the terms on which the contract was to be rescinded. They have not done so and that is the end of the matter.

C I also would allow the appeal with costs.

Barakbah C.J. (Malaya): The appellant (defendant) was the registered lessee of a mining land held under Mining Leases Nos: 3910 and 4092 Lots 711 and 70 in the Mukim of Kerling, district of Ulu Selangor. By a sub-lease Presentation No. 1649 Vol. 11 Folio 12 dated the 3rd of January 1961, he sub-leased a part of the said land to the respondents (plaintiffs) and one Ch'ng Ewe San for the purpose of mining.

It was provided by the said sub-lease that the respondents and the said Ch'ng Ewe San should pay to the appellant a sum of \$7,500 to be treated as advance payment of tribute payable by the respondents to the appellant and that the said sum was to be repaid by the appellant by way of deductions by the respondents of 25 per cent of the tribute payable under the said sub-lease until such time as the said sum had been re-paid to them. The said sum was paid by the respondents to the appellant. The said Ch'ng Ewe San did not make any payment.

In or about July 1961 the respondents surrendered the said sub-lease to the appellant and no further payments of tribute were thereafter payable to the appellant. At the time of the surrender the appellant had paid to the respondents by way of deductions a sum of \$445.27 leaving a balance of \$7,054.73. The appellant failed to repay the balance and the respondents filed an action in court claiming the said amount with interests and costs. On 5th November judgment was entered for the respondents and the appellant now appeals to this court against the said decision.

The agreement was for a period of three years. No evidence was adduced on either side on the facts and it was not disputed that the respondents surrendered the sub-lease with the consent of the appellant before the expiration of the said period. This amounted to a rescission by mutual consent. The agreement had come to an end and therefore there was no further claim on it. In the case of *Davies v. Street*,⁽¹⁾ it was held that if a contract was broken, an action for money had and received could not be

brought by a person who had paid money under such contract, but he must bring an action for the breach of contract; but, in cases where the contract was rescinded and put an end to, as in the present case, an action for money had and received would lie. This was what the respondents claimed and the issue was whether the money could be recovered as money had and received.

In order to succeed in an action for money had and received, the plaintiff had to prove that there was a total failure of consideration and the parties could be restored to their original position. According to *Halsbury's Laws of England* 3rd Ed. Vol. 8 at page 243 paragraph 421:

"Where a plaintiff has paid money in pursuance of his obligations under a contract, and the consideration for which he entered into the contract totally fails, he may either sue for damages for breach of contract, or bring an action for the return of the money so paid as money had and received to his use.

Where, however, the failure of consideration is not total but merely partial, then, unless the contract has been frustrated, the plaintiff is restricted to an action for damages for breach of contract.

A complete failure of the consideration of a contract occurs where one of the contracting parties fails to receive some benefit or valuable consideration which springs from the root and is in the essence of the contract. If, however, he once receives such a benefit then he has no remedy in this form of action."

In the case of *Colton v. Dorrell*,⁽²⁾ the headnote reads:

"The plaintiff agreed to let to the defendant a house at a certain rent, a premium to be paid on the completion of the lease. The defendant was let into possession and paid part of the premium. He subsequently refused to take the lease, owing to some difference about the terms of the agreement.

The plaintiff sued for use and occupation of the premises. The defendant pleaded set-off.

Held: that he was not entitled to set-off the part of the premium he had paid, as there had not been an entire failure of consideration."

Keating J. observed:

"There has been a part performance of the contract; the defendant has taken possession of the premises, and paid the plaintiff £42 on account. This sum cannot be used as a set-off, as the consideration has not wholly failed, and the parties cannot be put in *statu quo*, for the defendant has been let into possession. If there has been a breach of the contract on the part of the plaintiff, the defendant has his remedy on the agreement, and in this way the question would be raised as to his liability to pay to the plaintiff the £9. He has no right of set-off against him."

See also *Hunt v. Silk*.⁽³⁾

In the present case the consideration was the tribute and there was no total failure of consideration as some tribute had been paid. Therefore in my opinion no action would lie for money had and received.

Counsel for the respondents argued that as there was no forfeiture clause in the agreement,

A the money should be refunded. He referred to the cases of *Mayson v. Clouet*,⁽⁴⁾ *Lee Sau Keng v. Yong Hon Fa*,⁽⁵⁾ and *Dies and anor. v. British and International Mining and Finance Co. Ltd.*⁽⁶⁾ The case in question differed from the above cases as there was no deposit and there was no frustration, merely rescission of contract.

B Another point to consider was the true construction of clause 2(c) of the agreement which reads as follows:—

C "That the sum of dollars seven thousand seven hundred and sixty-two (\$7,762) shall be treated as advance payments of tribute and the sub-lessees shall be at liberty to deduct twenty-five (25) per centum of the tribute payable by them hereunder until such time as the said sum of \$7,762 is fully repaid and thereafter the full tribute shall be paid by the sub-lessees to the sub-lessor."

D It appeared to me that the sum of \$7,762 was advance payments of tribute to be deducted at the rate of 25% of the tribute payable by the respondents to the appellant. The respondents would continue to do so until the said sum was fully repaid after which the full tribute should be paid by the respondents to the appellant. Therefore in my view the true construction would be that the amount was an advance of the tributes and since it had to be deducted from the tributes and as no further tributes were payable, there could be no claim for the balance.

E To recapitulate, as there was a rescission by mutual consent, as the respondents could not claim for money had and received because there was no total failure of consideration and the parties could not be restored to their original position, and as upon the true construction of clause 2(c) in the agreement, the amount was treated as advance payment of tributes and such payment was to be deducted from the tributes which later ceased to be paid, the claim by the respondents for the balance must necessarily fail.

G In the circumstances I would allow the appeal with costs.

Tan Ah Tah F.J. concurred.

Appeal allowed.

Solicitors: S.M. Yong & Co.; Skrine & Co.

LING HOCK TEE v. GOH CHOON MOI

[A.C.J. (McGilligan J.) May 13, 1965]

[Sibu — Civil Appeal No. 2 of 1965]

I *Practice and Procedure — Trial — Change of magistrates — Evidence recorded by previous magistrate relied on by subsequent magistrate — Consent of parties not obtained — Whether procedure irregular.*

The plaintiff's claim was for a sum of money arising out of "hui" transaction. The case was originally heard by a magistrate, who heard the evidence of the plaintiff, two witnesses for the plaintiff and the defendant. The case was then adjourned. Subsequently the parties